IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22202

ALBERT E. LEUTHOLD, SUPERINTENDENT OF BANKS, STATE OF MONTANA, HELENA, MONTANA, SECURITY BANK AND MINERS BANK OF MONTANA, N. A.

Appellants

VS.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

Appellee

THE FIRST NATIONAL BANK OF BUTTE AND DALY NATIONAL BANK OF ANACONDA

Intervenor-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, BUTTE DIVISION

BRIEF OF INTERVENOR-APPELLEES

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JURISDICTION

The District Court concluded in its opinion and order (R. 54; Appendix B to this brief) that this action embodied a challenge to a decision of the Comptroller of the Currency with respect to branch banking and that it therefore gave rise to jurisdiction under the *Administrative Procedure*

Act, 5 U.S.C. 1001, *et seq.* (now 5 U.S.C. 701, *et seq.*). Intervenors contended below and still contend (see parts III.A. and III.B. of this brief) that appellant Leuthold lacked standing to sue and that the District Court lacked jurisdiction over appellants' claim under the *Bank Holding Company Act of 1956.*

The judgment below having been entered on November 8, 1967, *nunc pro tunc* as of August 29, 1967, this Court has jurisdiction pursuant to *28 U.S.C.* 1291.

QUESTIONS PRESENTED

1. Was the District Court correct in concluding that appellants failed to state a claim under the National Bank Act?

2. Was the District Court correct in concluding that appellants failed to state a claim under the Bank Holding Company Act?

3. Did appellant Leuthold lack standing to sue?

4. Did the District Court lack jurisdiction over appellants' claim under the Bank Holding Company Act?

5. Was appellants' attempted showing of irreparable injury inadequate to support injunctive relief?

6. Should injunctive relief be withheld in the public interest?

7. Should injunctive relief be withheld because of the doubtful nature of its effect?

STATUTES INVOLVED

12 U.S.C. 36(b)(2), the National Bank Act:

> "A national bank (referred to in this paragraph as the 'resulting bank'), resulting from the consolidation of a national bank (referred to in this paragraph as the 'national bank') under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—
>
> (A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;. . . ."

12 U.S.C. 36(c), the National Bank Act:

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . . (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . ."

12 U.S.C. 1842(a), the Bank Holding Company Act of 1956:

> "(a) It shall be unlawful, except with the prior approval of the Board, . . . (4) for any bank holding

company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; . . . ."

12 U.S.C. 1842(d), the Bank Holding Company Act of 1956:

"(d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. . . ."

12 U.S.C. 1847, the Bank Holding Company Act of 1956:

"Any company which willfully violates any provision of this chapter, or any regulation or order issued by the Board pursuant thereto, shall upon conviction be fined not more than $1,000 for each day during which the violation continues. . . ."

Section 5-1028, Revised Codes of Montana (1947):

"No bank shall maintain any branch bank, receive deposits or pay checks, except over the counter of and in its own banking house. Provided, that nothing in this section shall prohibit ordinary clearing house transactions between banks. . . ."

Section 5-1124, Revised Codes of Montana (1947):

"When any two or more banks located in the same county or in adjoining counties shall consolidate in accordance with the provisions of section 5-1021. the consolidated bank may, if it has a paid up capital of seventy five thousand dollars ($75,000.00) or more, upon the written consent of the superintendent of banks and under rules and regulations promulgated by him, maintain and operate offices in the locations of the consolidating banks."

Chapter No. 72, Montana Session Laws, 1967:

Section 1. Any state or national bank. banking corporation, or private bank, the stock, moneyed capital, or moneys and credits of which are subject to taxation under the provisions of chapter 3 and chapter 46. title 84, Revised Codes of Montana, 1947, and which has banking offices in more than one (1) county. shall furnish to the assessor of each such county the information required of it by chapter 46, title 84, Revised Codes of Montana, 1947, together with a statement of the book value of real estate owned and located in the respective counties and a statement of the deposit liability shown by the books of account of said bank at each of its said banking offices at the close of business the day next preceding the first Monday in March; and the aggregate tax on the stock, moneyed capital, and moneys and credits of such bank computed as provided by law shall be assessed by and be paid to the respective counties in the proportion which the amount of the deposit liability shown on the books of the office or offices of such bank located in such counties, respectively, shall bear to the total deposit liability of such bank.

Section 2. All acts and parts of acts in conflict with this act are hereby repealed.

Section 3. This act shall be in full force and effect from and after its passage and approval.

STATEMENT OF THE CASE

The nature of the case is accurately described in the first four paragraphs of the opinion and order of the District Court (R. 54), a copy of which is attached hereto for the convenience of this Court as Appendix B.

When the District Court denied all relief to the plaintiffs, they filed a notice of appeal and moved for an injunction pending appeal to restrain the Comptroller from approving the application for consolidation. Both the District Court and this Court denied plaintiffs' motions. Thereafter, the Comptroller approved the consolidation, it was accomplished, and the resulting bank, First National Bank, now operates banking offices at Butte and Anaconda.

SUMMARY OF ARGUMENT

Under Section 36 of the National Bank Act, *12 U.S.C.* 36, a national bank may, with the approval of the Comptroller, operate a branch if state banks in that state are authorized to do so by state statute law. In Montana, RCM 5-1124 permits a state bank to branch pursuant to a consolidation. Therefore the resulting bank may branch pursuant to the consolidation of intervenor banks. The District Court was thus clearly correct in concluding that appellants failed to state a claim under the National Bank Act.

The Bank Holding Company Act provides, in *12 U.S.C.* 1842(a), that it shall be unlawful, except with prior approval of the Federal Reserve Board, for any bank holding company or subsidiary thereof, "other than a bank," to acquire the assets of a bank. The phrase "other than a bank"

removes from the restrictions of the act the acquisition of the assets of the First of Butte by the Daly. The District Court was therefore clearly correct in concluding that appellants failed to state a claim under the Bank Holding Company Act.

The National Bank Act is federal law and it contains no provision for enforcement by a state official. The Bank Holding Company Act is also federal law, and it was intended to be enforced solely by federal criminal prosecution. Appellant Leuthold, a state official, therefore lacked standing to enforce either statute.

Because the exclusive method of enforcement of the Bank Holding Company Act is federal criminal prosecution, the District Court lacked civil jurisdiction over appellants' claims under that statute.

An injunction—particularly an injunction against the performance of duty by a public official—will not issue except upon a clear showing of irreparable injury. Appellants' evidence on injury in this case was speculative, conjectural, confused, self-contradictory, and unreliable. Intervenors presented clear and convincing evidence of lack of probable irreparable injury. Thus, no factual foundation for injunctive relief was established.

There is a strong public interest in banking competition. A court of equity should withhold injunctive relief when such action will serve the public interest. Here the facts show that the consolidation of intervenor banks will benefit the public of Butte. The injunction sought by appellants would therefore be inappropriate.

A court of equity will not issue an injunction of doubtful effect. In this case, appellants really seek to prevent not the proposed consolidation but, rather, an invigoration of

banking competition in Butte. Such an increase in competition may occur even if the proposed consolidation does not. Therefore, the requested injunction should not issue.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY HELD THAT APPELLANTS FAILED TO STATE A CLAIM UNDER THE NATIONAL BANK ACT.

The District Court held that the consolidation and operation of the intervenor banks is permitted by the provisions of the National Bank Act. Appellants' quarrel with this conclusion is set out in parts A and B of their brief, which are considered in order below.

A. Section 36(c) of the National Bank Act does not Prohibit the Maintenance of a Branch Bank after Consolidation of the Intervenor Banks.

The gist of appellants' argument under Section 36(c) of the National Bank Act, *12 U.S.C.* §36(c), is as follows: Under the provisions of that paragraph, a national bank may establish and operate branches, with the approval of the Comptroller of the Currency, if state banks in that state are authorized to do so by state law. Under the Revised Codes of Montana, 1947 (hereinafter referred to as "RCM"), Section 5-1028, state banks are prohibited from operating branches. Therefore, if the banks here in question consolidate, they may not operate a branch in Butte. This argument errs for the following reasons.

1. The statute law of Montana affirmatively authorizes the establishment of a branch by a state bank fol-

lowing consolidation. RCM Section 5-1028, which generally prohibits branch banking by Montana state banks, has been in effect since the 1927 codification of the Montana banking statutes by Chapter 89 of the *Laws of 1927*, in which this provision appeared as Section 101. Subsequently, there was enacted as Section 1 of Chapter 129, *Laws of 1931*, a provision now appearing as RCM Section 5-1124, which reads as follows:

> "When any two or more banks located in the same county or in adjoining counties shall consolidate in accordance with the provisions of Section 5-1021, the consolidated bank may, if it has a paid up capital of seventy-five thousand dollars ($75,000 00) or more, upon the written consent of the superintendent of banks and under rules and regulations promulgated by him, *maintain and operate offices in the locations of the consolidating banks*." (Emphasis added.)

Section 2 of Chapter 129 provides: "All Acts and parts of Acts in conflict herewith are hereby repealed." This express repealer makes it clear that Section 5-1124 modifies, and was intended by the Montana Legislature to modify, the general prohibitory language of RCM Section 5-1028.

But even in the absence of such repeal provision, Section 5-1124, being both the later and the specific provision, would prevail in the situation to which it refers. For RCM Section 93-401-16, which has been the law in Montana since 1877, provides as follows:

> "In the construction of a statute the intention of the legislature, and in the construction of the instrument the intention of the parties, is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So

> a particular intent will control a general one that is inconsistent with it."

In *Story Gold Dredging Co. v. Wilson,* 106 Mont. 166, 175, 76 Pac. 2d 73, 78 (1938), the Montana Supreme Court said:

> "We have said in the case of Durland v. Prickett, 98 Mont. 399, 39 P. 2d 652, 656: 'In the case of Langston v. Currie, 95 Mont. 57, 26 P. 2d 160, 163, this court said: "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnance between them, the special will prevail over the general. State ex rel Daly v. Dryburgh, 62 Mont. 36, 203 P. 508." This rule is applicable here, and accordingly section 6825 is of no controlling force as applied to the facts in this case . . .' "

This, of course, is the answer to Opinion No. 23, Volume 31 (Sept. 29, 1966), of the *Opinions of the Attorney General of Montana* (Pl. Ex. No. 1), which concludes that RCM Section 5-1124 cannot be read to permit establishment of branches by consolidated banks because that would produce a conflict with RCM 5-1028. There is no conflict between these two statutes for the simple reason that Section 5-1124 constitutes a partial amendment of Section 5-1028. The two, taken together, harmonize to prohibit branch banking in Montana *except* pursuant to a consolidation.

There is no reason to suppose that RCM Section 5-1028 is immune to the sort of amendment which RCM Section

5-1124 in fact effected. Indeed, RCM Section 5 1028 was also amended by Chapter 39, *Laws of 1963*, and Chapter 80, *Laws of 1965*. The former established rules for the operation of detached drive-in and walk-up facilities by state banks, and the latter amended the former with respect to the rules governing distances between these special facilities and other facilities or banks.

It is therefore clear that the Montana law on branch banking is no longer the simple prohibition that it was in 1927. Rather, it is a general prohibition subject to an exception in the case of bank consolidations and a further exception for drive-in and walk-up facilities. (It cannot be argued that the legislature reenacted the original prohibitory provisions of RCM 5-1028 in enacting the 1963 and 1965 amendments, because, under RCM Section 43-510, a statute is not deemed to have been repealed and reenacted in amended form, but, rather, the unamended portion is considered to have been law from the date of its enactment and only the new provisions are considered to have been enacted at the time of amendment.)

2. The Attorney General's opinion, mentioned above, seeks to avoid these conclusions by reliance on the word "offices" in RCM 5-1124. It suggests that the consolidated bank may operate separate "offices," but no such office can serve as a branch for the purpose of engaging in the banking business.

We have already shown that it is not necessary to resort to this strained construction, for RCM Section 5-1028 and RCM Section 5-1124 harmonize without difficulty when the word "offices" is construed to include branches. And there is no reason why the terms "office" and "branch" must be considered mutually exclusive. For ex-

ample, the national bank branching statute, *12 U.S.C.* Section 36(f), in defining "branch," has, since its original enactment in 1927, included the terms "branch office" and "additional office." Further, Section 36(b) of *12 U.S.C.*, on which appellants rely, speaks of the operation of branches by a consolidated bank at the "main office" or "branch office" of a bank participating in the consolidation. Obviously, the concept of "office" includes the concept of "branch" in common banking practice.

If the Montana Legislature had intended in RCM Section 5-1124 to authorize only offices not performing banking functions, it could readily have written an express limitation to that effect. This was demonstrated when the Legislature enacted Chapter 39, *Laws of 1963,* authorizing drive-in and walk-up facilities in language that explicitly limits the functions of such facilities to receiving deposits, cashing checks, receiving payments, and other transactions usually handled at tellers' windows By contrast, in RCM Section 5-1124 the Legislature not only omitted any such limitation, but authorized the consolidating banks to operate "offices" at the "locations" of the consolidated bank. At least one such "location" will, of course, be the main banking "office" of any such consolidated bank.

It necessarily follows that the term "office," as used in RCM Section 5-1124, includes a place where general banking services are offered to the public. It further follows that permission to operate "offices" at the "locations" of the consolidating banks constitutes permission to provide general banking services at all such locations, for the statute contains no language to provide a basis for distinguishing the main banking "office" of the consolidated bank from any other of its "offices."

Appellants fail to deal with this argument. They contend at length (App. Br. 13-23) that the word "office" may on occasion mean something less than the word "branch" when applied to a bank. This argument is self-defeating. As indicated above, when the Montana Legislature has wished to describe a banking facility of limited scope, it has shown itself perfectly capable of doing so in explicit language. And, in other states, when a legislature has wished to limit the powers of a banking "office" it has done so explicitly and by definition. (See, *e.g.*, App. Br. 22.) The Montana Legislature incorporated no such limited definition of "office" into Section 5-1124. (The Court is referred to that portion of the District Court's opinion (Appendix B hereto) which follows the heading "The National Bank Act" for a discussion of this question which, to intervenors, seems unanswerable.)

Intervenors suggest further that most of this portion of appellants' argument is not properly before this Court. It is a familiar principle that an appeal must be decided solely upon the evidence actually produced in the court below. See, *e.g.*, *Moose v. Vesey*, 225 Minn. 64, 67, 29 N. W. 2d 649 (1947), and authorities cited therein. Appendix G to appellants' brief sets forth the exhibits introduced at the trial of this case. Appendices A through F of appellants' brief contain a variety of other exhibits. Not one of these is listed in Appendix G because not one was offered to the court below. All would have been open to objection on the grounds of relevance, authenticity, hearsay, and the like. Yet this Court is now asked to base its decision in part upon them. Under the rule stated above, this is clearly inappropriate.

Appellants have sought to introduce these items of evi-

dence into this appeal in an effort to shore up their argument that history supports their construction of the law. This historical argument (see, *e.g.*, App. Br. 16-20) is wildly speculative and conjectural. It relies on evidence never placed before the trial court. It assumes knowledge and attitudes on the part of Montana legislators which are impossible to substantiate. It conjures up a pseudo-legislative history to stand in place of a legislative history which appellants cannot possibly document. And, ironically, it lends more support to intervenors than to appellants, for it spotlights the fact that while some people were thinking of defining "office" to mean less than "branch," the Montana Legislature was omitting to enact any such narrow definition.

In contrast, intervenors actually introduced newspaper articles (D. Exs. D and E) into evidence to show that Section 5-1124 was thought at the time of its enactment to authorize the operation of branches upon consolidation. The trial court excluded these exhibits from evidence (Tr. 212), despite ample authority supporting their admissibility. See, *Dallas County v. Commercial Union Assur. Co.*, 286 F. 2d 388 (5th Cir. 1961); *Montana Power Co. v. Federal Power Comm'n*, 185 F. 2d 491 (D.C. Cir. 1950), *cert. denied* 340 U. S. 947 (1951), *reh. denied* 341 U. S. 912. These admissible newspaper accounts lend additional support to the District Court's conclusion that in Section 5-1124 the word "offices" means "branches."

3. It is therefore abundantly clear that, in Montana, consolidating banks may operate banking branches at their pre-existing locations. Any question on this count was laid to rest by the Montana Legislature at its most recent session. There, on January 21, 1967, a bill (House Bill

No. 509; D. Ex. C) was introduced to repeal RCM Section 5-1124.

Appellant Albert E. Leuthold testified in support of this repeal bill. In his prepared testimony (D. Ex. B) Mr. Leuthold vigorously urged that the proposed consolidation of the intervenor banks was an attempt to establish branch banking, that it would lead to a rash of consolidations, that it would lessen competition in Montana banking, and that approval of H.B. 509 would resolve this situation. He professed to believe, further, that Section 5-1124 was a special depression measure the need for which had expired, that by their reliance upon it these intervenors were "circumventing our laws" and engaging in "illegal action," and that it would lead to a "rash of consolidations." He added, "If the legislature kills H.B. 509 or does nothing about it, it will have a bearing on the pending court case."

In the face of these arguments and dire predictions, *the Legislature killed H.B. 509 on February 1, 1967,* and left Section 5-1124 in force.

It is axiomatic that the paramount rule of statutory construction is that the intention of the legislature is to be given effect. *Doull v. Wohlschlager,* 141 Mont. 354, 377 P. 2d 758 (1963); *Fulton v. Farmers Union Grain Terminal Association,* 140 Mont. 523, 374 P. 2d 231 (1962). Legislative intent can be shown not only by action but by deliberate refusal to act. For example, in *Board of Education v. Public School Employees' Union,* 233 Minn. 144, 45 N. W. 2d 797 (1951), the court held that the repeated introduction and defeat of legislation to prohibit strikes by public employees indicated that the legislators did not believe that existing legislation prohibited such strikes. And in *American Bridge Co. v. Smith,* 352 Mo. 616, 179 S. W. 2d

12 (1944), *cert. denied,* 323 U. S. 712, the court held that the repeated failure of the legislature to amend a tax statute to give it the meaning urged by one of the parties indicated that the legislature did not intend it to have that meaning.

This approach to statutory construction is firmly fixed in Montana law. In *Bottomly v. Ford,* 117 Mont. 160, 167-168, 157 P. 2d 108, 112 (1945), the Montana Supreme Court stated:

> "Generally, of course, legislative intent is indicated by its action rather than by its failure to act. 'On the other hand, it has been declared that the silence of the legislature, when it has authority to speak, may sometimes give rise to an implication as to the legislative purpose, the nature and extent of that implication depending on the nature of the legislative power and the effect of its exercise. . . .' "

Thus, when the legislature had expressly been requested to change the rule of a Montana Supreme Court decision, but had defeated measures introduced to effect such change, the court held that there was "no logical way" of interpreting its actions otherwise than as "approval and confirmation" of the case sought to be overruled (117 Mont., at 169, 157 P. 2d, at 113).

More recently, the Montana Supreme Court considered this matter in *James v. V. K. V. Lumber Company,* 145 Mont. 466, 401 P. 2d 282 (1965). In that case, the Court found itself faced with the problem of legislation introduced to change the definition of the word "injury" under the Montana Workmen's Compensation Act and recognized the legislative attempt to change the definition of "injury" by stating as follows:

"Since our decision in the Lupien case, the Thirty-ninth Legislative Assembly has met. We note that at least three bills were introduced in the Senate, Senate Bills Nos 94, 48 and 206, each of which had as their purpose a change in the definition of injury contained in section 92-418. Senate Bill No. 94, as introduced, would have changed the definition, but later was amended and enacted into law, re-enacting section 92-418 just as it was when the Lupien case was decided; Senate Bill No 48 and Senate Bill No. 206 would have redefined injury; Senate Bill No. 206 would have included 'strains' in the definition. Both measures were killed. Thus, we have a legislative consideration of the very definition involved."

"For the foregoing reasons the judgment of the district court is reversed." 401 P. 2d, at 283.

The *James* case, being the most recent pertinent expression of the view of the Montana Supreme Court, is binding upon a federal court applying Montana law. See, *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538, 543 (1941). Further, the *Bottomly* conclusion is necessitated here. Once the proponents of H.B. 509 had urged, as did appellant Leuthold, that defeat of that bill would lead to branch banking via bank consolidation in Montana, and the Legislature had deliberately killed H.B. 509, there became "no logical way" of interpreting this legislative action otherwise than as "approval and confirmation" of the interpretation of RCM Section 5-1124 which H.B. 509 was intended to eradicate. Mr. Leuthold expressly warned the Legislature that rejection of H.B. 509 would have a bearing on the present case; the Legislature nonetheless rejected it. Surely a clearer expression of legislative intent would be difficult to find.

4. But the Montana Legislature did not stop here. Rather, it gave even more convincing proof of its interpretation of RCM Section 5-1124 by enacting into law a new taxing statute (Chapter No. 72, Montana Session Laws 1967, House Bill No. 205; (D. Ex. A)), which states that any state or national bank which "has banking offices in more than one (1) county" shall be taxed by the respective counties "in the proportion which the amount of the deposit liability shown on the books of the office or offices of such bank located in such counties, respectively, shall bear to the total deposit liability of such bank." In other words, the Montana Legislature recognized that *some Montana banks may maintain "banking offices" in more than one county and that they may choose to keep customer deposits at each of them.*

There is simply no other way to interpret the action of the Montana Legislature in passing H.B. 205. Legislative intent is "gathered from the terms of the statute considered in the light of the surrounding circumstances." *Veterans' Welfare Commission v. Department of Mont. V.F.W.*, 141 Mont. 500, 506, 379 P. 2d 107, 110 (1963). Here the circumstances show the legislature first refusing to repeal a statute which allows consolidating banks to maintain branches, and then enacting a statute which allocates taxes among deposit-holding banking offices of banks operating in more than one county. Clearly the Legislature (1) read RCM Section 5-1124 to allow the operation of branches by a consolidated bank, (2) confirmed its approval of RCM Section 5-1124 by refusing to repeal it, and (3) established a tax allocation system to cover the multi-branch situation which it interpreted RCM Section 5-1124 to authorize. In Montana, as elsewhere, statutes which relate

to the same general subject matter "should be construed together where there is no inconsistency between them, and effect given to both where this is possible." *State ex rel. Ronish v. School District No. 1 of Fergus County,* 136 Mont. 453, 462, 348 P. 2d 797, 802 (1960). Further, a statute will not be construed as meaningless or a nullity. *Doull v. Wohlschlager,* 141 Mont. 354, 364, 377 P. 2d 758, 763 (1963). " 'Every word, phrase, clause or sentence employed (in a statute) is to be considered and none shall be held meaningless if it is possible to give effect to it.' " *Fletcher v. Paige,* 124 Mont. 114, 119, 220 P. 2d 484, 486 (1950).

All of the foregoing rules of statutory construction would be violated by appellants' urged construction of RCM Section 5-1124, given the recent enactment of H.B. 205. Unless RCM Section 5-1124 is read to permit branch operations by consolidated banks, H.B. 205 becomes a nullity, without effect, and its language becomes meaningless. If it is not possible for banks to maintain "banking offices in more than one (1) county," it is absurd to legislate tax apportionment among counties, as in H.B. 205, according to the proportion of "deposit liability" located in each such county. To avoid construing the passage of H.B. 205 as a useless, even senseless act, it is necessary to conclude that some provision of Montana banking law permits some banks to operate banking offices in more than one county. The only provision that can be construed to give such authority is RCM Section 5-1124. It follows that a consolidated bank can perform banking services at all locations at which the consolidating banks performed such services.

B. Section 36(b)(2) of the National Bank Act Does Not Prohibit the Maintenance of a Branch after Consolidation of the Intervenor Banks.

Appellants' argument as to this aspect of the case can be sustained only by a misreading of the statute which omits one important phrase and overemphasizes another.

1. On page 27 of their brief, appellants direct the court's attention to the following language:

> "(2) A national Bank * * * may retain and operate as a branch * * * A main office or a branch office * * * if, under subsection (c) of this section, *it might be established as a new branch* * * *" (Emphasis added.)

This grossly distorts the true meaning of the statute by omitting after the words "new branch" the words "of the resulting bank." This language renders appellants' attempted paraphrase of the statute (App. Br. 27, 37) patently erroneous. The statute does *not* say that the *acquiring* bank may operate a branch if such branch could be established as a new branch of the *acquiring* bank. Rather, it says that the *resulting* bank (*i.e.,* the bank resulting from the consolidation) may retain and operate as a branch a main or branch office which could be established as a new branch of the *resulting* bank. The distinction is vital because a branch of the *resulting* bank is precisely what RCM 5-1124 authorizes when it permits a "consolidated" bank to maintain offices in the locations of the "consolidating" banks.

An accurate comparison of the relevant portion of the statute with a sound paraphrasing of it demonstrates appellants' error. The statute actually reads, in pertinent part:

> "(2) A national bank (referred to in this paragraph as the 'resulting bank'), resulting from the consolidation of a national bank (referred to in this paragraph as the 'national bank') under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—
>
> (A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;. . . ."

Substituting the names of the banks involved in this consolidation, we may read:

> "(2) First National Bank (the 'resulting bank'), resulting from the consolidation of Daly National Bank of Anaconda (the 'national bank') under whose charter the consolidation is effected with another, bank or banks (*i.e.*, The First National Bank of Butte), may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—
>
> (A) a main office or branch office of The First National Bank of Butte if, under subsection (c) of this section, it might be established as a new branch of First National Bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;. . . ."

Thus, contrary to appellants' contention, the test is not whether the Daly National Bank of Anaconda could estab-

lish a branch in Butte, but whether the "resulting" or "consolidated" bank, *i.e.*, First National Bank, may do so. As intervenors have shown at length, that is exactly what RCM 5-1124 permits.

2. In any event, Section 36(b)(2) has very little bearing on the correct outcome of this litigation. This is so because that section says that the resulting bank may retain and operate a branch "if, *under subsection (c) of this section,* it might be established as a new branch of the resulting bank,. . . ." Hence, we are directed to Section 36(c) for guidance. That section states that:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . . (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition,. . . ."

Thus, we are referred to Montana statute law and, inevitably, to RCM 5-1124. Intervenors have already discussed this statute in great detail. Suffice it here to recall that RCM 5-1124 authorizes a "consolidated" bank to "maintain and operate offices in the locations of the consolidating banks." The requirements of Section 36(c) are therefore satisfied.

Appellants argue that "offices" in RCM 5-1124 does not include "branches" or, at least, that it includes branches only "by implication." The error of this proposition has been exhaustively discussed in Part I.A. of this brief and need not be reconsidered here. As the District Court stated:

> "When the Montana legislature in §5-1124 used the word 'office' without limitation, it specifically granted the authority to engage in banking in two locations under the limitations imposed by the section. The mere fact that the parties and counsel argue to the contrary does not mean that the power to maintain two offices arises by implication or recognition."

Appellants point to the term "new branches" in Section 36(c) and argue that no Montana statute authorizes "new branches." This is an irrelevant quibble. If, as the trial court held, "offices" includes "branches," it does not matter that the word "branches" is not used in RCM 5-1124. And the only kind of branch which RCM 5-1124 could possibly authorize in the present case is a "new" branch. This is so because the office of the acquired Butte bank has never before been a branch and, as operated after the consolidation, must for the first time become a "new" branch of the consolidated bank.

Once again, appellants attempt statutory paraphrase (App. Br. 37) to lend credibility to their position, but the paraphrase is clearly in error because it uses the words "Anaconda Bank" where the title "First National Bank" should appear. A correct paraphrase would read:

> "(b) First National Bank (the 'resulting bank'), resulting from the consolidation of Daly National Bank of Anaconda, under whose charter the consolidation was effected, with The First National Bank of Butte may retain and operate as a branch the main office or a branch office of The First National Bank of Butte if, under subsection (c) of this section, such main office or branch office might be established as a new branch of First National Bank.
>
> (c) First National Bank may establish and oper-

> ate a new branch at Butte if such establishment and operation are now authorized to State banks by RCM 5-1124."

Because, as we have shown, RCM 5-1124 would authorize operation of a Butte branch by First National Bank if it were a state bank, it follows that the same authorization exists in the present case. Appellants' paraphrase misleads by creating the appearance that the operation of a branch in Butte is permissible only if the acquiring Anaconda bank could have opened a *de novo* branch in Butte. To the contrary, all that is necessary is that the "consolidated" bank, First National Bank, be able to operate offices at the locations of the "consolidating" banks, and intervenors have never contended otherwise.

3. Appellants contend that their interpretation of Section 36(b)(2) "makes good sense" and "follows the congressional intent" (App. Br. 37). Yet they also stress the congressional purpose, in enacting the National Bank Act, to place state and national banks on a basis of competitive equality where branch banking is concerned (App. Br. 13-14, 26, n. 25). They cannot have it both ways, because their reading of Section 36(b)(2) would establish a situation of inequality—favoring state banks as against national banks—contrary to the congressional policy.

If the trial court was correct, as intervenors believe, then RCM 5-1124 authorizes state banks to operate branches pursuant to a consolidation. Unless national banks have the same opportunity, they will be placed at a competitive disadvantage. It follows that appellants' artificial interpretation of Section 36(b)(2) must be erroneous The real question in this case is, what does RCM 5-1124 authorize?

Appellants' resort to Section 36(b)(2) is simply a smokescreen designed to shroud the real issue in confusion. The National Bank Act, including Sections 36(b)(2) and 36 (c), was, by appellants' own admission, intended to place national banks and state banks on an equal footing. Therefore, Sections 36(b)(2) and 36(c) must be read here to authorize national banks to do whatever is authorized to state banks under RCM 5-1124. As we have shown, that statute authorizes branching pursuant to a consolidation.

4. There is no merit to appellants' contention (App. Br. 26, n. 25) that the District Court's decision has upset the balance of competitive equality in Montana.

If the Court affirms the decision below, the Montana Attorney General's Opinion (P. Ex. No. 1) will be without authoritative effect. Absent litigation, that opinion might have been entitled to some weight, but it "is not to be regarded as a legal precedent or authority of such character as a judicial decision." *Mogis v. Lyman-Richey Sand & Gravel Corp.*, 189 F. 2d 130, 139-140 (8th Cir. 1951), *cert. denied* 342 U. S. 877. Even in jurisdictions where an opinion of the attorney general is, by statute, binding upon administrative officials, it ceases to be so when overruled by a court of competent jurisdiction. See, *e.g.*, Minn. Stat. Ann. §8.07. And the rule that a public official is obliged to follow an opinion of the attorney general is inoperative when there is no longer a basis for well-founded doubt or uncertainty as to the construction to be placed upon a statute. *Standard Surety & Casualty Co. v. Oklahoma*, 145 F. 2d 605, 609 (10th Cir. 1944).

Thus, if this Court affirms the District Court's decision that the statute law of Montana affirmatively authorizes the establishment of a branch by a state bank following con-

solidation, the contrary opinion of the Montana Attorney General will have no further significance. In the unlikely event that appellant Leuthold should attempt to rely on that opinion as his reason for denying to consolidating state banks the privilege of conducting a banking business at more than one location, he will be in clear violation of his legal duty, and the consolidating state banks may force him to grant such authority by resort to the established Montana proceeding for a writ of mandate. (See RCM Sections 93-901 to 93-9114). In any event, the possibility of such rough treatment of Montana state banks by the Montana Superintendent of Banks seems remote to say the least. Moreover, it is irrelevant here. As the District Court stated, "If the administrator of the state law sees fit to deprive the state banks of rights which the statute law gives them, the resulting inequality is created by administrative fiat and not by statute law." (See Appendix B hereto.)

5. Appellants cite no judicial authority for their interpretation of Section 36(b)(2). Further, they note that the District Court appears not to have considered their argument under Section 36(b)(2) in reaching its decision (App. Br. 28).

This is not surprising, for appellants cannot fairly be said to have relied on this theory below. This "new branch" theory under Section 36(b)(2), mentioned only once as a tardy afterthought in a motion hearing, was never pursued. It did not appear as a basis for a cause of action in appellants' complaint, and it was never briefed or argued before the trial court. Nor was any of the factual information set forth in Part B of appellants' brief placed before the trial court.

We have already noted, in Part I.A. 2. of this brief, that

an appeal must be decided solely upon the evidence actually produced in the court below. See, *e.g., Moose v. Vesey,* 225 Minn. 64, 67, 29 N. W. 2d 649 (1947), and authorities cited therein. It is equally clear that a party may not rely on a new theory, *Allen v. Central Motors, Inc.,* 204 Minn. 295, 283 N. W. 490 (1939), or a new statutory subsection, *American Surety Co. v. Greenwald,* 223 Minn. 37, 25 N. W. 2d 681 (1946), on appeal. The object of a trial is to get all issues and evidence before a forum of first impression. This purpose would be defeated by consideration of appellants' theory and evidence under Section 36(b)(2) by this Court.

II.

THE DISTRICT COURT CORRECTLY HELD THAT APPELLANTS FAILED TO STATE A CLAIM UNDER THE BANK HOLDING COMPANY ACT.

The Bank Holding Company Act of 1956 provides, in *12 U.S.C.* §1842(d), that no application for the purchase of a bank located in one state by a bank holding company having its principal office in another state shall be approved unless such an acquisition is specifically permitted by the law of the state in which the acquired bank is located. Appellants and *Amici* assert that this provision effectively prohibits the bank consolidation here in question.

However, *12 U.S.C.* §1842(a) provides:

> "(a) It shall be unlawful except with the prior approval of the Board * * * (4) for any bank holding company or subsidiary thereof, *other than a bank,* to acquire all or substantially all of the assets of a bank. * * *" (Emphasis added.)

Thus, by the express terms of the Bank Holding Company Act, acquisitions of the assets of a bank by a bank subsidiary of a holding company are not prohibited. The consolidation approved in this case by the Comptroller is within the above exception to the Act.

The Bank Holding Company Act has been construed by the Federal Reserve Board, which is charged with the duty of enforcing the Act, not to apply to such acquisitions. The Board's interpretation has recently been approved in *State of South Dakota v. National Bank of South Dakota,* 219 F. Supp. 842 (D.S.D. 1963), *aff'd* 335 F. 2d 444 (8th Cir. 1964), *cert. denied* 379 U. S. 970 (1965):

> "The phrase 'other than a bank' in subsection (3) creates an exception to the restrictions contained in the remainder of the statute. The exception applies when the assets of a bank are acquired by a bank which is a subsidiary of a holding company.
>
> "The Board of Governors of the Federal Reserve System recognized this fact and recommended a change in the statute which would have withdrawn the exception. Federal Reserve Bulletin, July 1958, pp. 787-89. The change was not adopted. In 1960 the recommendation was withdrawn by the Board with the explanation that since the Bank Merger Act of 1960, 12 U.S.C.A. §1828(c), required the prior approval of one of the Federal bank supervisory agencies in practically all cases of bank mergers and absorptions, the extension of the coverage of the Bank Holding Company Act to cover bank mergers in which holding company banks are involved would produce an unjustified duplication of supervision. 47th Annual Report of the Board of Governors of the Federal Reserve System, 1960, pp. 98-99, as quoted in a letter from the Hon. James J. Saxon, Comptroller of the Cur-

rency, to the Hon. Wright Patman, Chairman, Committee on Banking and Currency, March 14, 1963. Hearings before the House Committee on Banking and Currency, 88th Cong., 1st Sess., pp. 153-155." 219 F. Supp. at 853.

Plaintiffs in *South Dakota, supra,* also asserted the argument raised by appellants in this action that *12 U.S.C.* §1842(d) prohibits the consolidation approved by the Comptroller. Both the District Court, and the Court of Appeals rejected the plaintiffs' contention. The District Court noted that the Federal Reserve Board has consistently construed §1842(d) to apply only to acquisitions which must be approved by the Board pursuant to §1842(a). The Court stated:

"The State argues that the words 'Notwithstanding any other provision of this section, no application shall be approved * * *' in §1842(d) make that subsection applicable to the instant case. This is not true, however, since under §1842(a)(3), approval by the Board of Governors is not required when a subsidiary bank of a holding company acquires the assets of another bank. The Board of Governors, in a letter to Mr. Joseph H. Colman, Chairman of the Board of First Bank Stock Corporation, dated April 30, 1963, stated that it has consistently construed §1842(d) to apply only to cases in which Board approval is required under §1842(a). The interpretation of the Board of Governors, while not controlling, is entitled to substantial weight. First National Bank in Billings v. First Bank Stock Corporation, 9 Cir., 1962, 306 F. 2d 937, 941. The Court believes that the Board's interpretation of §1842(d) is correct. It follows, then, that the acquisition of the assets of the Thomson banks fell within the exception contained in §1842(a)(3) of the Bank Holding Company Act of 1956." 219 F. Supp. at 853.

See also, *First National Bank in Billings v. First Bank Stock Corp.*, 197 F. Supp. 417, 422 (D. Mont., 1961), *aff'd* 306 F. 2d 937 (9th Cir., 1962).

Plaintiffs in *South Dakota, supra,* argued, as do the appellants in this action, that the court should "pierce the corporate veil." They alleged that the acquisition was actually by the bank holding company and not by the subsidiary. This the Court refused to do:

> "* * * While it is true that courts have the power to pierce the corporate veil when the situation warrants such action, Ohio Tank Car Co. v. Keith Ry. Equipment Co., 7 Cir. 1945, 148 F. 2d 4, the Court does not believe that this is a proper case for the exercise of such power. There was no fraud or bad faith involved in this merger. It is true that the stockholders of the Thomson banks received First Bank Stock stock in exchange for the assets of the banks. There were good reasons why this was desirable from their standpoint, however. By receiving stock instead of cash, the stockholders had the benefit of a tax-free exchange. Moreover, they received shares of a stock that is traded in the over-the-counter market and whose day to day market value can thus be readily ascertained. The merger does not strike the Court as being a subterfuge, and the Court will not interfere with it merely because it may have enabled First Bank Stock to take advantage of a legitimate exception in the Bank Holding Company Act." 219 F. Supp. at 854.

On appeal the Court of Appeals for the Eighth Circuit held that the decision of the District Court was correct:

> "* * * We have chosen to review such decision upon the merits Judge Mickelson's opinion, 219 F. Supp. pp. 852-854, convincingly demonstrates that the activities here attacked constitute an acquisition of as-

sets (not of stock) by a bank (not by a holding company) and hence we agree that the transaction falls within the exception granted by §1842(a). Such section, so far as here material, provides:

> '(a) It shall be unlawful except with the prior approval of the Board * * *; (3) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank * * *.'

"The words in the statute 'other than a bank' clearly show the intention of Congress not to require a bank acquiring the assets of another bank to obtain Board approval. The remaining subsections of §1842, including subsection (d) largely relied upon by the plaintiff, set forth the procedures to be followed where an application to the Board of Governors is required. The words of subsection (d) reading: 'no application shall be approved under this section' manifest a Congressional intention that the section only applies to instances where approval of the Board of Governors is required. As Judge Mickelson points out, such interpretation is substantiated by the legislative history and the administrative interpretation of such provisions by the Board of Governors." 335 F. 2d at 448-449.

With respect to the argument that the acquisition by the subsidiary was in reality one by the holding company, the court also affirmed the decision of the District Court:

> "Plaintiff urges that the corporate veil should be pierced and that the transaction should be treated as an acquisition by the holding company rather than by the bank. The trial court properly rejected such contention, stating that no subterfuge was here involved. National Bank is a separate corporation. It

> has held a national charter for many years and is to continue as the surviving bank. It serves a definite corporate purpose, separate and distinct from the holding company. First Bank Stock Corporation has existed as a separate corporation owning stock of National and other banks for a considerable period of time. In this respect, this case differs materially from Whitney Nat'l Bank v. Bank of New Orleans and Trust Co., supra." 335 F. 2d at 449.

The facts in this case are virtually identical to those in the *South Dakota* case. The Daly bank, organized in 1883, has acquired the assets of the First. As a consequence, there is now a single resulting bank, First National Bank, operating offices at two locations. The holding company, Banco, organized in 1929, did not acquire the old First of Butte and turn it into a subsidiary. Rather, the acquiring entity was the Daly, and only one entity, First National Bank, survives the consolidation. That entity has *one* president and *one* board of directors. In no sense was the acquisition a sham, for the parties involved are old, established institutions and the transaction did not leave the First of Butte as a separate operating entity.

Thus, no subterfuge is involved in this case. The parties have merely proceeded under an express exception to the provisions of the Bank Holding Company Act. The approval of the Comptroller and the interpretation given the Act by the Federal Reserve Board are entitled to great weight in establishing that the Act does not prohibit this consolidation. The Bank Holding Company Act, like the National Bank Act, is federal law. See, *Millard v. National Bank of Detroit,* 338 Mich. 610, 615, 61 N. W. 2d 804 (1953); *State of South Dakota v. National Bank, supra,* 219 F. Supp. 842, 846. Since these statutes are adminis-

tered by the Comptroller and the Board, the interpretation of their requirements by those agencies is entitled to "great deference." See, *Udall v. Tallman,* 380 U. S. 1, 16 (1965); *First National Bank in Billings v. First Bank Stock Corp.,* 306 F. 2d 937, 941 (9th Cir., 1962). Such deference is especially appropriate now that those interpretations have the support of the Court of Appeals for the Ninth Circuit and the District Court for South Dakota in the *South Dakota* case (which rejected the arguments of the Independent Bankers Association, appearing by its counsel, Mr. Horace R. Hansen, as *amicus curiae*), of the District Court for Montana in *First National Bank in Billings v. First Bank Stock Corp., supra,* and of the trial court in this case. (See Appendix B to this brief.)

Moreover, it is important to note that the interpretation of the statute advanced by appellants and *Amici* would destroy the balance of competitive equality between banks which appellants strongly profess to support. If the Bank Holding Company Act is read to prohibit the asset acquisition here in question, then a bank owned by a bank holding company may not make an acquisition which is open to a bank not so owned. Even the appellants and the Attorney General of Montana admit that Montana law permits state banks to consolidate. The principle of competitive equality therefore requires that the Bank Holding Company Act be read to permit, rather than prohibit, the consolidation of national banks here in question.

As the foregoing authorities show, there is no impediment to this construction in either the statute or its legislative history. Only by striking the words "other than a bank" from Section 1842(a) can appellants' contrary interpretation be upheld. What appellants and *Amici* really seek is

amendment of the statute. The Congress has refused to perform such legislative surgery, and appellants and *Amici* cannot reasonably ask that this Court do so.

III.

THE DECISION BELOW IS SUPPORTED BY ADDITIONAL INDEPENDENT GROUNDS.

It is well settled that a party which is satisfied with the judgment below may argue for its affirmance on grounds which were overlooked, ignored, or even rejected by the lower court. See, *e.g., United States v. American Ry. Express Co.,* 265 U. S. 425, 435-436 (1924); *Langnes v. Green,* 282 U. S. 531, 538-539 (1931). There are numerous additional grounds for affirmance in the present case.

A. Appellant Leuthold Lacked Standing to Sue.

The trial court found that appellant Leuthold had standing to sue. Intervenors contended that he did not, relying on a case virtually identical to the present case, *State of South Dakota v. National Bank of South Dakota,* 219 F. Supp. 842 (D.S.D. 1963), *aff'd* 335 F. 2d 444 (8th Cir. 1964), *cert. denied* 379 U. S. 970 (1965).

In *South Dakota,* as here, the plan of consolidation called for the acquiring bank to obtain all of the assets of the acquired banks in exchange for stock of the bank holding company (First Bank Stock Corporation) which owned a majority of the stock of the acquiring bank. The Comptroller approved, and the resulting bank established branches at the locations of the three acquired banks. The Attorney General of South Dakota then brought an action against the resulting bank and its parent holding company, claiming violations of the National Bank Act, the Bank

Holding Company Act, and South Dakota banking law. The complaint sought a declaratory judgment, injunctive relief against operation of the branches, and an order for divestiture of the acquired assets.

The District Court held that the state of South Dakota lacked standing to complain, and it stated (219 F. Supp. at 848):

> "It has been held that violations of the National Bank Act may be challenged only by the federal government. Kerfoot v. Farmers & Merchants' Bank, 218 U.S. 281, 31 S. Ct. 14, 54 L Ed. 1042 (1910); National Bank of Genesee v. Whitney, 103 U. S. 99, 26 L. Ed. 443 (1880); Union National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188 (1878).
>
> "The Comptroller of the Currency is charged under 12 U.S.C.A. §93 with the duty of prosecuting actions for violations of any of the provisions of the National Bank Act. There is no provision for enforcement of the national banking laws by the states. . . ."
>
> * * * * *
>
> "The enforcement of the Bank Holding Company Act of 1956 is dependent upon criminal prosecution. 12 U.S.C.A. §1847. There is no provision in the Act for civil enforcement, and although there apparently have been no decisions respecting the enforcement of the Act, the legislative history of the Act leads the Court to believe that Congress clearly intended to limit the enforcement to criminal prosecutions. . . . Where Congress has not provided for civil suits to enforce federal legislation, it is not for the courts to do so. . . .
>
> "For the reasons heretofore stated, the Court is of the opinion that the State of South Dakota has no standing to challenge the validity of the establish-

> ment and operation of the three branch banks by the defendant National Bank, and that likewise, the State has no standing to maintain an action to enforce the provisions of the Bank Holding Company Act of 1956."

Upon appeal, the question raised under the National Bank Act had become moot, and the Court of Appeals agreed with and affirmed the District Court's conclusions with respect to the Bank Holding Company Act (see 335 F. 2d, at 447-448).

Intervenors respectfully submit that the *South Dakota* case is squarely in point and convincingly demonstrates that appellant Leuthold lacked standing to bring the present action.

B. The Bank Holding Company Act Does Not Confer Civil Jurisdiction.

The District Court also rejected intervenors' argument that it lacked jurisdiction to enforce the Bank Holding Company Act. Here again, the *South Dakota* case supports intervenors.

In the foregoing passage from the District Court opinion, the court explicitly noted that the act may be enforced only by means of federal criminal prosecution. The court therefore concluded that "where Congress has not provided for civil suits to enforce federal legislation, it is not for the courts to do so."

On appeal, the Court of Appeals agreed, stating (335 F. 2d, at 447-448):

> "The Bank Holding Company Act contains no express provision for civil enforcement. The legislative history of the Act as shown by Judge Mickelson's opin-

ion supports the defendants' view that Congress intended the criminal enforcement provision to be exclusive. . . . In an earlier proposed Bank Holding Company Bill, S. 310, 77th Congress, express provision is made for civil enforcement of any liability or duty and for injunctive relief.

"At various hearings before Congressional committees, Governors of the Federal Reserve System charged with the administration of the Act advocated criminal penalties as the exclusive means for enforcement. Governor Robertson, appearing before the Committee on behalf of the Board on June 24, 1952, stated:

> 'Bearing always in mind the desirability of keeping the legislation to a minimum, it is our feeling that the only essential measure of enforcement, and the most effective one, would be a provision for criminal penalties for violation of the statute or of conditions prescribed by the administering agency in granting consent to acquisitions of bank stocks. This would place complete responsibility for enforcement of the law in the Department of Justice. The administering agency would not be placed in a position in which it would be required to institute proceedings for enforcement.' . . .

"Similar statements were made at subsequent hearings in subsequent years. . . .

"Thus it appears that the Act and its legislative history disclose no intent on the part of Congress to create rights to be enforced by civil litigation."

It is therefore apparent that the present claim of violation of the Bank Holding Company Act should have been dismissed for want of jurisdiction.

C. An Injunction Is Inappropriate because Irreparable Injury Was Not Shown.

Intervenors argued in the District Court that appellants were not entitled to injunctive relief except upon a persuasive showing of irreparable injury. "In addition to having a clear right, there must also be an apparent and pressing necessity for an injunction. The injury threatened must be imminent and such as can only be avoided by an injunction." *Emery v. Emery,* 122 Mont. 201, 200 P. 2d 251, 261 (1948). The burden of showing irreparable injury is particularly heavy where, as here, appellants seek to enjoin a public official in the discharge of his duty. See *State v. Kreig,* 145 Mont. 521, 402 P. 2d 405 (1965).

In a banking context, as elsewhere, the plaintiff must make a strong showing of irreparable injury in order to prevail. Thus, in *Bank of Sussex County v. Saxon,* 253 F. Supp. 857 (D.N J. 1966), plaintiff sought a preliminary injunction on the basis of an affidavit stating it had lost over 30 accounts, totaling approximately $200,000, by reason of unlawful establishment of a branch by a competitor, and that continued operation of the branch would divert more than 600 of its checking accounts, having deposits of $600,000, and 1,200 savings accounts, having deposits of $1,200,000 in addition to depriving plaintiff of substantial amounts of personal and mortgage loans. All of these allegations were denied by the competing bank. The court concluded that the affidavits did *not* disclose probable irreparable damage to plaintiff bank (see 253 F. Supp., at 860).

Also in a banking context, it has been emphasized that the remedy of injunction is extraordinary and that "the granting of such relief is not, as a rule, a matter of

absolute right, but one of legal discretion." *First National Bank in Billings v. First Bank Stock Corp.*, 197 F. Supp. 417, 427 (D. Mont. 1961), *affirmed* 306 F. 2d 937 (9th Cir., 1962). The court there noted, "It is not sufficient grounds for the issuance of an injunction that injurious acts may possibly be committed. There must be at least a reasonable probability that the injury will be done if no injunction is granted and there must be more than mere fear or apprehension . . ." (197 F. Supp., at 428).

Intervenors believe that all of appellants' evidence on damage was speculative, conjectural, and without foundation, and that it failed to make the showing of irreparable injury which the law requires. In this connection, the Court's attention is directed to the trial transcript.

Appellants' principal witnesses on injury were Harold Pitts, President of appellant Miners Bank of Montana, Paul Robert, President of appellant Security Bank, and Charles Rubie, President of Bancorporation of Montana, which owns seven Montana banks, including appellant Miners Bank Each of these men was permitted to testify on a wide range of business and economic matters despite intervenors' objections to this opinion evidence as elicited from persons obviously not qualified as experts.

On direct examination, witness Pitts testified that the proposed consolidation would result in a loss to the Miners Bank of $10,505 in one year as a result of predicted new loan competition from the consolidated bank (Tr. 39-43). However, on cross examination, he admitted that: (a) this computation assumed that the Butte loan market was static, whereas it might be expanding (Tr. 54-55); (b) the entry of the Security Bank into the Butte market for the first time in 1954 had not prevented the Miners Bank from

greatly increasing its deposits and loans (Tr. 55 57); (c) the new Security Bank did not injure the Miners Bank (Tr. 58); (d) he, as a loan officer, would require considerable time to inject a large amount of new money into the Butte loan market (Tr. 62-65); (e) he could sell loan participations to the consolidated bank without injuring the Miners Bank (Tr. 68); (f) some Butte loans are made by banks in other cities and the consolidated bank could handle these without injuring the Miners Bank (Tr. 68-69); (g) and even that, by conservative computation, the Miners Bank could probably reinvest moneys remaining after any lost loans to derive an income of at least $9,575 to counterbalance the claimed loss of $10,505 (Tr. 69-75).

Witness Robert estimated the loss of the Security Bank at $10,330, also because of a predicted loss of loans to the consolidated bank. However, on cross examination, he admitted that: (a) he, too, would probably require some time to inject a large amount of new loan money into the Butte market (Tr. 109-110); (b) his computation of loss was based on an averaging process that failed to take account of variations in the type of loan that might be involved (Tr. 111, 112); (c) the cost of reinvesting in municipal bonds would be at least somewhat lower than the cost of making local loans (Tr. 112-114); (d) his bank could not currently absorb additional loan demand in Butte (Tr. 114); (e) loan volume in Butte has expanded in recent years (Tr. 115-116); (f) his bank, too, could sell loan participations to the consolidated bank without loss (Tr. 117); (g) his bank's location gave it a measure of competitive advantage (Tr. 118); and (h) his opening of a *de novo* bank in Butte in 1954-55 did not damage banking in that city (Tr. 119-120).

On direct examination, witness Rubie testified that the proposed consolidation would cost the Miners Bank $13,-181.44 (Tr. 137-138), even though Mr. Pitts, the President of the Miners Bank, had already estimated its probable loss at $10,505, as Mr. Rubie knew (Tr. 145). On cross examination, Mr. Rubie attempted to establish, for separate purposes, that the Butte loan market both was, and was not, fluid (Tr. 145-148). He then: (a) demonstrated an obvious inability to predict the future rates of the consolidated bank (Tr. 148-152); (b) admitted that part of the Butte loan demand was being satisfied by outside money (Tr. 153-154); and (c) expanded on his earlier profit-and-loss testimony in a manner that cast grave doubt on its validity (Tr. 154-157, 159-160).

Thus, appellants' case on competitive injury was without foundation, lacked any degree of certainty, rested on invalid premises, and was riddled with internal inconsistencies.

In contrast, intervenors called Charles E. Haywood, Dean of the College of Business and Economics at the University of Kentucky and a man eminently qualified to testify on banking and economic trends (see Tr. 173-179). Appellants chose not to cross examine Dr. Haywood (Tr. 211). His unchallenged testimony was to the effect that: (a) the prospects for national economic growth are good (Tr. 181); (b) it is likely that the Butte-Anaconda area will participate in this rising trend (Tr. 182) and the banking industry of the area can anticipate more vigorous expansion (Tr. 183-184); (c) for a number of persuasive reasons, the consolidated bank is not likely to damage or injure the competitive structure of the banking business in Butte (Tr. 189-191, 193-203); (d) in fact, the consolidated bank may

have some difficulty retaining old business (Tr. 192-193), and may also help to further economic growth in Butte to the benefit of the entire community (Tr. 203-204, 207); (e) and, finally, absent consolidation, the Butte bank faces a decline by "cannibalization" which could lead to its elimination from the Butte banking market (Tr. 204-205).

On the basis of all of the foregoing, intervenors submit that appellants have totally failed to establish the probability of irreparable injury necessary to support a claim for injunctive relief.

D. An Injunction Would be Contrary to the Public Interest.

There is a strong public interest in the maintenance of competition, and that interest clearly extends to competition among banks. See, *e.g., United States v. First City National Bank of Houston,* 18 L. Ed. 2d 181 (U.S., March 27, 1967).

The Supreme Court has said that "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *United States v. First National City Bank,* 379 U. S. 378, 383 (1965); *Virginian Ry. Co. v. System Federation No. 40,* 300 U. S. 515, 552 (1937). Indeed, it has gone so far as to say that a court of equity "may in the public interest, even withhold relief altogether, and it would seem that it is bound to stay its hand in the public interest when it reasonably appears that private right will not suffer." *Securities and Exchange Commission v. United States Realty and Improvement Co.,* 310 U. S. 434, 455 (1940).

To illustrate, in *United States v. Morgan*, 307 U. S. 183, 194 (1939), the Court said:

> "It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved. . . . Congress having by the Packers and Stockyards Act established the public policy of maintaining reasonable rates for stockyard services, and having prohibited and declared unlawful any unjust or unreasonable rate, a court of equity should be astute to avoid the use of its process to effectuate the collection of unlawful rates. . . ."

Here, as the uncontradicted testimony of witness Haywood shows (Tr. 202-203, 207), the proposed consolidation would beneficially serve the needs and interests of the banking public of Butte Conversely, denial of the right to consolidate may destroy intervenor Butte bank as a significant competitive entity (Tr. 204-205). Indeed, witnesses Pitts (Tr. 77-79) and Rubie (Tr. 157-159) both testified to participating in negotiations aimed at acquiring the First of Butte for Bancorporation of Montana and *closing* it thereafter. It is entirely possible that this will be the fate of the First of Butte if the present consolidation is denied. It is a fate that would leave three competitors in the Butte banking community instead of four, to the detriment of the public of Butte.

The facts and law therefore demand that the public interest be served by affirmance of the decision below.

E. An Injunction Would be of Doubtful Effect.

It is axiomatic that a court of equity will deny injunctive relief in a situation in which an injunction is unlikely to accomplish its purpose. A clear case in point is the de-

cision in *Great Northern R. Co. v. Lumber and Sawmill Workers, Local Union No. 2409,* 140 F. Supp. 393 (D. Mont. 1955), *affirmed* 232 F. 2d 628 (9th Cir., 1956), *cert. denied* 352 U. S. 837, which involved picketing against a common carrier in a labor dispute. The District Court deemed it unnecessary to determine whether the Norris Laguardia Act applied because *even if the picketing was illegal,* an injunction would not provide an effective remedy. Quoting from *Great Northern R. Co. v. Local Great Falls Lodge of International Ass'n of Machinists, No. 287,* 283 Fed. 557, 563 (D. Mont. 1922), the Court first set forth the rules governing injunctive relief, as follows:

> "Injunctions go only in cases of urgent necessity, made to appear by competent, material, credible, and preponderating evidence, to guard against injuries, not merely feared by the applicant, but reasonably to be apprehended, and likely to be irreparable. They are extraordinary remedies, granted with great caution, and in the exercise of sound judicial discretion. *That the applicant is annoyed, threatened, and injured will never justify a court to grant him an injunction, unless these trespasses are so great that they threaten him with irreparable injury, within the settled meaning of that term in equity*" (140 F. Supp., at 395; emphasis in the original).

The court then stated:

> "*Also, before a Court will grant an injunction, it should appear with reasonable certainty that the injunction will be effective to prevent the damage which it seeks to prevent. From the allegations of the complaint here, it is extremely doubtful that an injunction would alleviate plaintiff's difficulty at all . . .*" (140 F. Supp. at 396; emphasis added).

This Court affirmed on the basis of the opinion of the District Court (232 F 2d 628, 629).

Great Northern highlights a major difficulty with appellants' complaint in the present case. Their alleged grievance arises not out of the proposed consolidation, but out of the prospect of effective competitive operation of the consolidated bank. But the proposed consolidation is not necessary to the rise of effective new competition from the First National Bank of Butte. Unless the appellant banks are, in fact, able to "cannibalize" the First of Butte, such competition can come from the sale of that bank to another, or even from the advent of new management without a sale. Since the bank is up for sale, and since its present management is nearing retirement, some such change is virtually certain. It follows, therefore, that an injunction against the proposed consolidation may well be ineffective to save appellants from the increased competition which they fear.

Hence, as in the *Great Northern* case, regardless of the other legal questions raised, the District Court's denial of an injunction was correct.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

John D. French

JOHN D. FRENCH,
An Attorney for Intervenor-Appellees.

CERTIFICATE OF SERVICE

I hereby certify that the brief of intervenor-appellees has been served by mailing three copies thereof to each of the following counsel of record in this cause: Donald A. Garrity, assistant attorney general, Mitchell Building, Helena, Montana 59601, John M. Schiltz, 403 Electric Building, Billings, Montana 59101, and Fred J. Weber, Citizens Bank Building, Havre, Montana 59501, attorneys for appellants; Moody L. Brickett, United States Attorney, United States Post Office & Court House, 400 N. Main Street, Butte, Montana 59701, and Stephen R. Felson, Appellate Section, Civil Division, United States Department of Justice, Washington, D.C. 20530, attorneys for appellee; and Horace R. Hansen, 600 Degree of Honor Building, St. Paul, Minnesota, attorney for *Amici Curiae*.

Dated February 20, 1968.

John D. French

JOHN D. FRENCH,
An Attorney for Intervenor-Appellees.

APPENDIX A

In The United States District Court
For The District of Montana
Butte Division

Civil No. 1444

ALBERT E. LEUTHOLD, Superintendent of Banks, State of Montana, Helena, Montana, SECURITY BANK and MINERS BANK OF MONTANA, N. A.,

Plaintiffs,

vs.

WILLIAM B. CAMP, Comptroller of the Currency,

Defendant,

THE FIRST NATIONAL BANK OF BUTTE and DALY NATIONAL BANK OF ANACONDA,

Intervenors.

FINDINGS OF FACT

From the evidence introduced, the Court finds:

I.

The First National Bank of Butte has not been in real competition with the other banks in Butte for some time. In 1940 it had 46.7% of all of the deposits in Butte banks as compared to 23.5% in 1965. Its deposits shrank 1.8 million between June 30, 1966 and June 30, 1967. At the

end of 1965 the ratio of loans to deposits was 23.6% as compared to an average of about 60% for its competitors. The ratio of local loans to deposits was 4.4%. In the real estate field in 1965, as judged by the mortgage recordings, it made five loans for a total of $97,500.00 out of a total of 468 loans for a total of $6,738,323.98 by all Butte banks. It has no installment loan department and makes almost no consumer loans.

II.

Under different lending policies there would be available for lending in the Butte market about $6,000,000.00 which is not now loaned or is loaned out of the Butte area.

III.

If the consolidation is effected, there will be a new and vigorous management of the First National Bank of Butte which will compete for local loans of all kinds and deposits with all of the Butte banks, including Miners.

Opinions were voiced by qualified experts that damages in excess of $10,000.00 per year would be sustained by Miners if the consolidation takes place. The court is of the opinion that these estimates omitted some factors which would have to be considered and fixed the yearly damages too high.

V.

The court finds that there are two variables here, the amount of yearly damage and the time over which it is to be projected. It is not realistic to project the non-competitive character of the First National Bank of Butte indefinitely into the future, but in view of the amounts of money in-

volved, the fact that many logical purchasers are prohibited by law from buying, and the fact that the present owners have for many years allowed the present situation to continue, the court is of the opinion, and finds, that as the variables mentioned are judged together the damages would exceed $10,000.00.

VI.

The court finds that the value of the matter in controversy with the Miners Bank of Montana N.A. is in excess of $10,000.00.

VII.

The court makes no finding as to damages which would be sustained by Security Bank if the consolidation is effected.

Dated this 28th day of August, 1967.

RUSSELL E. SMITH,
United States District Judge.

APPENDIX B

(Title of Cause.)

OPINION AND ORDER

This case concerns branch banking in Montana. The Bank Holding Company Act, 12 U.S.C.A. 1841 et seq. and the National Bank Act, 12 U.S.C.A. 36(c) are involved.

The plaintiffs are: Albert Leuthold, superintendent of banks of the state of Montana (superintendent), who has general supervisory power over state banks, and who is charged with the duty of executing all laws in relation to banks,[1] and who may close any bank which has violated any law of the state;[2] Security Bank (security), a bank chartered under the state law with offices in Butte; the Miners Bank of Montana, N.A. (Miners), a bank chartered under the federal law with offices in Butte.

The defendant is William B. Camp, acting comptroller of the currency of the United States (the comptroller).

The intervenors are The First National Bank of Butte (First of Butte) and Daly National Bank of Anaconda (Daly). Both are federal banks. Daly is a subsidiary of, and is controlled by, Northwest Bancorporation, a bank holding company. Daly proposes to acquire the assets of the First of Butte in exchange for stock of Northwest Bancorporation; to consolidate the First of Butte and Daly, and then to maintain full banking facilities in the present offices of the First of Butte and Daly. The comptroller has approved the plan and will issue a final certificate of approval unless enjoined by this court. At the outset the court

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[1]R. C. M. 1947, § 5-602, as amended.

[2]R. C. M. 1947, § 5-1101.

is faced with motions upon which rulings have been reserved and with affirmative defenses questioning the standing of the plaintiffs to sue and the court's jurisdiction.

JURISDICTION AND STANDING TO SUE.

This court does have jurisdiction and all parties have standing to sue. The decisions of the comptroller relating to branch banking are subject to review under the provisions of the Administrative Procedures Act.[3] The problem is fully discussed in First National Bank of Smithfield, N. C. v. First National Bank of Eastern North Carolina and James K. Saxon, Comptroller of the Currency, 232 F. Supp. 725 (E.D.N.C. 1964), affirmed on this point, 352 F. 2d 267 (4 Cir. 1965); Community National Bank of Pontiac v. Saxon, 310 F. 2d 224 (6 Cir. 1962); Bank of Dearborn v. Saxon, 244 F. Supp. 394 (E.D. Mich. 1965); American Bank and Trust v. Saxon, 248 F. Supp. 324 (W.D. Mich. 1965); Continental Bank v. National City Bank, 245 F. Supp. 684 (N.D. Ohio 1965), rev'd on other grounds, 373 F. 2d 283 (1967); Bank of Sussex County v. Saxon, 251 F. Supp. 132 (D. N.J. 1966). While the cases do not specifically say so, it is clear from the alignment of the parties that the courts treated competing banks as "persons suffering legal wrong . . . or adversely affected or aggrieved" within the meaning of 5 U.S.C. § 1009(a), and therefore entitled to a judicial review of agency action.

Whitney National Bank v. Bank of New Orleans, 379 U. S. 411 (1965) is not contrary. For the reasons later set forth the Bank Holding Company Act is not applicable here. In Whitney National Bank the issues which arose out of the Bank Holding Company Act were cognizable

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[3] 5 U. S. C. § 1001, et seq.

solely by the Federal Reserve Board and its findings were binding upon the comptroller. The Bank Holding Act provides that the decisions of the Federal Reserve Board are reviewable in the Circuit Courts.[4] The court in Whitney simply held that method of review to be exclusive.

The superintendent's standing to sue is not so clear. On this issue defendants and intervenors rely upon State of South Dakota v. National Bank of South Dakota, 219 F. Supp 842 (D. S.D. 1963), affirmed 335 F. 2d 444 (8 Cir. 1964), cert. den. 379 U.S. 970 (1965).[5] Plaintiffs rely upon Jackson v. First National Bank of Valdosta, 349 F. 2d 71 (5 Cir. 1965). Neither of these cases consider the applicability of the Administrative Procedures Act. In the South Dakota case substantial reliance was placed upon the proposition that where a regulatory act provides criminal penalties and is silent as to civil enforcement, that the criminal remedy will be deemed exclusive.[6] It is not desirable to use the criminal courts for a determination of economic rights. The penalties for incorrectly interpreting a law are too great and the criminal courts, because of the jury's inalienable right of pardon and the fact that the prosecutor cannot appeal from judgments of acquittal, are poor forums for the resolution of legal problems. The Administrative Procedure Act embracing as it does the declaratory judgment concept and providing rights of review which are not dependent upon a specific congressional authority to be found in the basic regulatory law, expresses a philosophy at odds with that underlying the rules relied upon

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[4]12 U. S. C. § 1848.

[5]It may be noted that the Circuit Court did not pass upon the Superintendent's standing to sue for violation of the National Banking Act.

[6]The eighth circuit seems to answer the question of standing in terms of the existence of a remedy.

in the South Dakota case. Even if the right of review in this case could not be found in the language of the Administrative Procedures Act, the court would consider it in appraising the South Dakota result.

The Jackson case is followed here insofar as the "standing to sue" problem is treated as one concerned with the interest of the superintendent in the subject matter of the litigation, and the sufficiency of that interest to qualify him as a party plaintiff.[7] This court considers jurisdiction to be a different problem. Many have standing to sue who may not find their way into the federal district courts,[8] and the court here does not hold the Congress, in § 36 (c) of the National Bank Act, adopted the remedial provisions of state law, and thus obliquely conferred jurisdiction on this court. In other words, the holding here is that the superintendent is a person "suffering a legal wrong or adversely affected or aggrieved" within § 1009(a) of the Administrative Procedures Act.

In separate findings the court has concluded that as to Miners the value of the matter in controversy is in excess of $10,000.00. The solution of the controversy depends upon the application of the National Bank Act and the Bank Holding Company Act. A federal question is in-

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[7]"Moreover, the Superintendent, as the primary enforcement officer of state banking laws which, under § 36(c), govern national banking associations, is particularly qualified to act as a plaintiff in cases such as this. He is also particularly well situated to represent interests adverse to those of a national bank which, even with the approval of the Comptroller of the Currency, would naturally be inclined to push the restrictions of § 36(c) to, or, if possible, beyond, their proper limits." Jackson v. National Bank of Valdosta, supra, at 75.

[8]The case of First National v. Union Trust Company, 244 U.S. 416. (1917) cited in Jackson did not involve the problem of jurisdiction of the federal district court.

volved and at least as to Miners the court does have jurisdiction under § 28 U.S.C. 1331(a).[9]

THE NATIONAL BANK ACT.

The Butte and Anaconda offices of the consolidated bank may be retained and operated unless such operation offends § 36(c) of the National Bank Act which provides in part:

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: * * * (2) at any point within the State in which said association is situated, *if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition,* and subject to the restrictions as to location imposed by the law of the State on State banks." (Italics supplied.)

The problem in this case arises under the italicized portion of the section.

In 1927 the Montana Legislature adopted what now appears as § 5-1028 R.C.M. 1947. It provides:

> "No bank shall maintain any branch bank, receive deposits or pay checks, except over the counter of and in its own banking house. Provided, that nothing in this section shall prohibit ordinary clearing house transactions between banks * * *"[10]

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[9]Suburban Trust Company v. National Bank of Westerfield, 211 F. Supp. 694 (D. N. J. 1962); Bank of Sussex County v. Saxon, supra.

[10]This section was amended in 1963 to permit detached drive-in and

In 1931 the Montana Legislature adopted what now appears as § 5-1124 R.C.M. 1947. It provides:

> "When any two or more banks located in the same county or in adjoining counties shall consolidate in accordance with the provisions of section 5-1021, the consolidated bank may, if it has a paid up capital of seventy-five thousand dollars ($75,000.00) or more, upon the written consent of the superintendent of banks and under rules and regulations promulgated by him, *maintain* and operate offices in the locations of the consolidating banks." (Italics supplied.)

The Daly and First of Butte are located in adjoining counties. They have a paid up capital in excess of Seventy-five Thousand Dollars ($75,000.00). The consolidation will not be under § 5-1021 R.C.M. 1947, the state law providing for consolidation, but under federal authority. None of the parties contend that this poses any problem.

The superintendent has not given his consent and has promulgated no rules governing the operation of consolidated banks. Under § 5-1124, and under these facts, may the consolidated bank maintain two separate banking facilities?

It is not seriously urged that the lack of consent by the superintendent is fatal to the proposed operation. It seems clear that it is not.[11]

The real controversy on the National Bank Act aspect of this case revolves about the plaintiffs' argument that

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walk-up facilities under some circumstances. R. C. M. 1947, § 5-1028 (Supp. 1967).

[11]First National Bank of Smithfield, North Carolina v. Saxon, supra; American Bank and Trust Company v. Saxon, supra.

§ 5-1028 forbids branch banking in Montana, and that § 5-1124 provides no exception even in those cases falling within its provisions. The plaintiffs argue that the word "branch" has a very special meaning; that the word "office" is a word with broad connotations; and that the use of the word "office" in § 5-1124 cannot be held to embrace the word "branch" as used in § 5-1028. It is further argued that had the legislature intended to amend § 5-1028, it would have done so by amending that section, rather than enacting § 5-1124, which makes no reference to the branch banking statute. The plaintiffs bolster their arguments by statements of the superintendent of banks who has administratively interpreted the act, and by the opinion issued by the attorney general of the state of Montana.[12] It is the opinion of the court that § 5-1124 created an exception to § 5-1028, and does in the limited classes of cases therein described permit branch banking in Montana.

The main problem is to find the intention of the legislature. The first place to look for that intention is in the words used. What did a Montana legislator reading the word "office" in the bill which became § 5-1124 contemplate? Did he envisage a space in which tellers stood behind counters, received deposits and cashed checks, and officers sat at their desks, frowned and made loans? It is probable that he did, because in Montana, at least, there is no other image of a bank office. If he did, then he envisaged branch banking, because basically the business of

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[12]There is no need to eleborate on the proposition that the National Bank Act sought to achieve an equality between state and national banks in branching matters: (First National Bank v. Walker Bank, 385 U. S. 252, 1966) and that what is forbidden to state banks by statute is also forbidden to national banks.

banking is receiving deposits and making loans. The word "office" is not foreign to banks and is commonly used to describe the place where banking activities take place. Congress has used the word in that sense.[13] The Federal Reserve Board uses the word in that sense.[14] The courts use the word in that sense,[15] and even the plaintiffs in their complaint use the word "office" to describe the place where the banking activities of the party banks take place. The Montana legislature, in the sections of the Commercial Code dealing with banking, uses the words "office" and "branch" as equivalents.[16] In the absence of a compelling reason for believing that the word "office" was used in some limited sense, it must be given its ordinary meaning, and in its ordinary meaning the word "office" describes a place where banking business is done.

This conclusion is fortified by the fact that unless the word "office", as used in § 5-1124 is given its normal meaning, the section does nothing. The superintendent suggested in a memorandum to the Montana legislature that § 5-1124 was enacted to "permit banks that were forced into liquidation to consolidate with another bank and to maintain an office for two or three months to wind up their banking business."[17] Apart from the fact that the language of the section indicates no such purpose and that there is no legislative history indicating it, the terms of the

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[13]12 U. S. C. 36(b)(2).

[14]Statement of Governor Robertson on behalf of the Federal Reserve Board before the House Committee on Banking & Currency, 82d Cong., 2d Sess., (June 24, 1952) pp. 16-18.

[15]First Hardin National Bank v. Fort Knox National Bank, 361 F. 2d 276 (6 Cir. 1966), cert. den. 385 U. S. 959 (1966).

[16]R. C. M. 1947, §§ 87A-4-102 and 87A-4-106.

[17]This same thought is expressed in an opinion of the Attorney General of Montana and in the briefs of the plaintiffs.

act seem to forbid any such interpretation. The use of the word "maintain" suggests continuity and casts doubt upon the suggestion of an operation limited to a period of two or three months. Why, if it were simply a matter of permitting activities necessary to close a consolidated bank, did the legislature confine the operation of this section to banks in adjoining counties, when, under § 5-1020, banks may be consolidated without regard to the county in which they are located? Why did the legislature require minimum capitalization if the office were to be operated for some limited purpose or time? Why would the consent of the superintendent, who has general supervisory power, be required for the maintenance of a temporary office for such limited purposes? Aside from all else, however, the question to which no one has given a satisfactory answer remains: Why, if § 5-1124 was intended to permit some activity short of banking, was it enacted at all? There is not now, and was not in 1931, any law which forbade banks from maintaining offices wherever they chose so long as they did not conduct a banking business in them.

Because § 5-1124 means nothing if the word "office" is given something less than its normal meaning, and because no reason has been suggested which indicates to the court that the legislature did intend a limited meaning, the court holds that § 5-1124 creates an exception to § 5-1028, and that what is sought to be done by the consolidating banks does not offend the statutory law of Montana. A consideration of the position of the superintendent and the opinion of the attorney general of Montana and the other canons of construction urged by plaintiffs does not lead to a contrary conclusion.

When the Montana legislature in § 5-1124 used the

word "office" without limitation, it specifically granted the authority to engage in banking in two locations under the limitations imposed by the section. The mere fact that the parties and counsel argue to the contrary does not mean that the power to maintain two offices arises by implication or recognition.

It is argued that the attorney general has ruled that state banks may not branch under the conditions described in § 5-1124; that the superintendent is bound by such ruling; and that henceforth state banks in Montana will be deprived of the equality of treatment which the National Bank Act sought to achieve. The answer to this is that Congress, in Section 36(c) of the National Banking Act, refers to the "statute law of the state". If the administrator of the state law sees fit to deprive the state banks of rights which the statute law gives them, the resulting inequality is created by administrative fiat and not by statute law.

THE BANK HOLDING COMPANY ACT.

Section 1842(a) of the Bank Holding Company Act[18] provides in part:

> "It shall be unlawful except with the prior approval of the Board, * * * (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; . . ."

Section 1842(d) provides:

> "Notwithstanding any other provision of this section, no application shall be approved under this sec-

[18]12 U. S. C. §§ 1841 et seq.

tion which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest. As amended July 1, 1966, Pub. L. 89-485, § 7, 80 Stat. 237."

There is no Montana law authorizing an out-of-State bank holding company to acquire the assets of banks located in Montana.

Do the words "other than a bank" appearing in § 1842 (a) make the Bank Holding Company Act inapplicable to this case, or do the words in § 1842(d) "notwithstanding any other provision of this section, no application shall be approved" effectively negate the exception provided in § 1842(a)?

It is clear from the language of 1842(a) that a bank, even if a subsidiary of a holding company, may, without prior Federal Reserve Board approval, acquire the assets of another bank. § 1842(d) does no more than limit the

approval power of the Federal Reserve Board. It would seem, therefore, and the court so decides, that § 1842(d) does not apply to asset acquisitions which do not require prior Reserve Board approval. This is the result reached by the District and the Circuit Courts in State of South Dakota v. National Bank of South Dakota, supra.[19]

The court is asked to pierce the corporate veil and hold that since Northwest Bancorporation, by virtue of its ownership of Daly, will own the First of Butte, the Bank Holding Company Act is violated.

There is no suggestion of fraud or deception. Rather the plaintiffs argue that because what is done in terms of real ownership is so like what is prohibited, that what is done likewise should be prohibited. Were the Act which applies here one passed in recognition of some community moral judgment, then a court might be tempted to, and might well look behind the corporate forms, to protect the basic social mores involved. Here, however, we deal with a regulatory measure designed to control the expansion of bank holding companies. There is no declaration that expansion is per se bad—only that each expansion must be evaluated in terms of its effect on the general public interest. The act itself makes formal and perhaps arbitrary distinctions between asset and stock acquisitions, between bank and bank holding company acquisitions. Under these conditions it is the court's opinion that it should not, by disregarding the corporate forms, abolish the distinctions that Congress created. This result was reached in State of South Dakota v. South Dakota National Bank, supra.

This opinion together with the separate findings of fact

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[19]If what is said on this problem in those decisions is dictum, then this court is not forced, but only persuaded, and the result is the same.

this day filed constitute the court's findings of fact and conclusions of law.

It Is Ordered, that all pending motions be, and the same are, hereby denied. On the merits It Is Ordered that plaintiffs be denied all relief.

Done and dated this 28th day of August, 1967.

RUSSELL E. SMITH,
United States District Judge.